PHILIP MORRIS COMPANIES INC. INTER-OFFICE CORRESPONDENCE

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TO: Distribution

DATE: January 11, 1990

FROM: Murray H. Bring MB

SUBJECT: Litigation -- Kotler

The judge in the Kotler case held a pre-trial conference today, at which he granted American's motion for summary judgment on the design defect claim. However, he denied American's motion for summary judgment on the pre-1966 failure to warn claim (none of us expected him to grant American's motion on the latter claim). He set February 12 as the date on which the trial will commence.

This is a favorable development, since the case is now limited to a very narrow claim, as to which American believes it has a strong defense.

At the conference, Professor Dershowitz, co-counsel for plaintiff, asked the judge to reconsider his earlier ruling dismissing Philip Morris and Liggett from the case. He argued that he thought the Third Circuit's opinion in the Cipollone case now made it possible for him to assert a generic risk-utility claim against all three defendants. Judge Skinner said that he would rule on the motion for reconsideration within "the next couple of days." However, his initial inclination is to deny the motion. He said that he had read the Third Circuit's opinion, that he thought it was verbose and unnecessarily complicated, and that it was "judicial activism" at its worst. He said that, as he read the opinion, it appears to have no bearing outside of New Jersey because it related solely to a question of New Jersey state law. This is, of course, the way in which we have characterized the Third Circuit's opinion. Should Judge Skinner ultimately issue a ruling consistent with his initial views, that would be helpful in our effort to demonstrate that the Third Circuit's opinion should hot be viewed as providing plaintiffs with a new opportunity for asserting claims in these cases.

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